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Supreme Court, U.S.
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In The Supreme Court of the United States

UNITED STATES *EX REL.* JEFFREY P. GOLDSTEIN

Petitioner(s)

v.

FABRICARE DRAPERIES, INC., *ET AL.*

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the lower courts are undermining the Civil False Claims Act, 31 U.S.C. §§ 3729-33, by misapplying this Court's directives on pleadings and Federal Rule of Civil Procedure 9(b)?

PARTIES TO THE PROCEEDING

The Petitioner is Jeffrey P. Goldstein. Mr. Goldstein instituted this action under the Civil False Claims Act, 31 U.S.C. §§ 3729-33 (the "FCA"), in the U.S. District Court for the District of Maryland. He therefore brings this action on behalf of himself and the United States. *See* 31 U.S.C. § 3730. In the Fourth Circuit Court of Appeals, Mr. Goldstein was the Appellant.

The Respondents, all of which were Defendants and then Appellees in the courts below, are: Fabricare Draperies, Inc.; Michael's Textile Co.; Skyline Mills; Panatex Fabrics, Inc.; Leonard's Draperies, Inc.; Contract Decor, Inc.; Empire Draperies Co.; Victor Rome, Inc.; ADM International, Inc.; Mill End Shops, Inc.; and John Carrow, Ltd., t/a Cresthill Draperies.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Jeffrey P. Goldstein respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Citations of Reports of Orders Below

The unpublished, consolidated, per curiam opinion of the Fourth Circuit Court of Appeals is reported in *United States ex rel. Goldstein v. Fabricare Draperies, Inc. et al.*, Appeal Nos. 03-1460 through 03-1465 (4th Cir., Jan. 6, 2004). It is reproduced in full in the Appendix.

Jurisdiction

The Fourth Circuit Court of Appeals' opinion underlying this Petition was decided on January 6, 2004. This Court has jurisdiction by Writ of Certiorari. 28 U.S.C. § 1254(1).

Statutory Provisions

Federal Rule of Civil Procedure 9(b) provides, in pertinent part, as follows: "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

The Civil False Claims Act, 31 U.S.C. §§ 3729-33, is set forth in full in the Appendix.

STATEMENT OF THE CASE

The Respondents are Federal drapery contractors. At its crux, the allegation against these Respondents is simple – they lied to the U.S. General Services Administration ("GSA"), in order to obtain a series of lucrative GSA Multiple Award Schedule ("MAS") contracts.

To be considered for a MAS contract, a supplier must meet certain rigid and exceptional requirements. For example, the Truth-in-Negotiations Act ("TINA"), 10 U.S.C. § 2306a (2000), required the submission of "cost or pricing data," unless the supplier qualified for TINA's "commerciality" exemption. A supplier claiming this commerciality exemption was required to demonstrate a specified percentage of non-Governmental sales of the solicited items, and to submit its current, published commercial price list for these items. Similarly, the Walsh-Healey Public Contracts Act of 1984, 41 U.S.C. §§ 35-45 (1994), permitted contracting only with the actual manufacturer or regular dealer of the solicited item, in order to avoid purchases from middlemen who boost prices and insulate true suppliers from liability. By such statutes and regulations, and standard MAS contract terms implementing these requirements, any supplier unable to meet one or more of these (and other) requirements was ineligible for a MAS contract.

In this case, the GSA sought proposals from qualified suppliers of draperies, bedspreads, blinds and related items. In his Amended Complaints (filed after the original complaints were dismissed with leave to amend), which range from 31 to 42 pages in length, the Petitioner alleges that the Respondents lied about their supposed commercial sales of solicited items; submitted fictive commercial price lists, created solely for their proposals;

falsely claimed to be a manufacturer or regular dealer of solicited items; and made related materially false representations, specified in the Amended Complaints, in order to induce the GSA to award MAS contracts. Having fraudulently induced the award of MAS contracts, all of the Respondents' invoices exploiting such contracts are "false claims" within the meaning of the FCA. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-44 (1943); *see also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (every invoice under a fraudulently-induced contract is a "false claim" within the meaning of the FCA), citing *Hess*, 317 U.S. 537, 543-44.

Specifically, and most pertinent to the Fourth Circuit's application of Rule 9(b), the Amended Complaints allege the "time," "place," "content," "identity," and "benefit obtained," as typically required in the Fourth Circuit to comply with Rule 9(b). For example, the Amended Complaints plainly allege as follows:

Rule 9(b) Fact	Allegation Examples
Time:	"On ***December 11, 1994***," Defendant Panatex's Malcolm J. Wilson executed a commerciality certification on behalf of Panatex. (Joint Appendix in Court of Appeals at ["A."] 358) (emphasis added).
	"In its ***December 14, 1994*** proposal under Solicitation No. GS-03F-95-AYC-0002, Panatex represented itself to the GSA to be the manufacturer of SINs 493-1 (draperies) and 493-2 (bedspreads)." (A. 376) (emphasis added).

Place: "***1243 N. Gene Autry Trail, Palm Spring, California 92262-5414.***" (A. 50) (emphasis added).

Content: In its 1989 proposal under Solicitation No. FCNH-89-D508-B-11-28-89, ***"Contract Decor represented itself to the GSA to be the manufacturer of Special Item Numbers 493-1 (Draperies and Drapery Accessories) and 493-2 (Coordinating Bedspreads)."*** Its ***representation was false***, as the Relator knows because: (a) he has been ***inside*** of Contract Decor's facilities and observed that it lacked manufacturing facilities; (b) Contract Decor ***subcontracted*** its manufacturing to Carol's Draperies, UNICOR and Silver State Industries; (c) he has ***observed*** such subcontract orders; and (d) he frequently has ***conversed*** with Contract Decor's President Marc Stewart about its manufacturing needs. (A. 247-48) (emphasis added).

On December 9, 1994, ***Skyline's Craig Schwartz falsely certified that Skyline's quoted prices were based on established catalog or market prices of items that Skyline had sold in substantial quantities to the general public***. (A. 326). In fact, Skyline was a "fabric jobber" that sold fabric, and not the solicited SINs. The Relator knows

this, because he did business with Skyline, because he purchased fabric from Skyline, and because he frequently discussed Skyline's operations with Stan and Craig Schwartz. (A. 336-37) (emphasis added).

Identity: On December 9, 1994, Skyline's **"Craig Schwartz"** executed the "Certificate of Established Catalog or Market Price." (A. 326) (emphasis added).

"On November 25, 1994, Mill End's ***June Graber, Joel Breslau and Elliot Breslau***" executed the commerciality certification. (A. 262) (emphasis added).

Benefit: ***Mill End obtained "MAS contract nos. GS-00F-3353A, GS-00F-3354A and GS-03F-5116C."*** (A. 269) (emphasis added).

As these examples demonstrate, the Amended Complaints specify the "time," "place," "content," "identity" and "benefit" facts required by the Fourth Circuit to comply with Rule 9(b).

The Respondents nevertheless renewed their Rule 9(b) motions. In Orders dated March 25, 2003 and April 10, 2003, and without any hearing, the U.S. District Court dismissed the Amended Complaints on the grounds that "Plaintiff makes no allegation based on personal knowledge that a particular defendant obtained a particular contract based upon a particular

representation. . . . He wants to obtain discovery to obtain particular information in support of those allegations. March 25, 2003 Mem. Op. (A. 420-22). Mr. Goldstein appealed.

In affirming the dismissal under Rule 9(b), the Fourth Circuit declined to acknowledge, much less address, even a single one of the above allegations, or any of the many, many other "time," "place," "identity," "content" and "benefit obtained" allegations in the Amended Complaints. Instead, the Fourth Circuit summarily held as follows:

> Having reviewed the briefs, the record, the arguments of counsel, and the relevant law, we hold that the district court correctly concluded that Goldstein's amended complaints did not set forth the time, place, content and individuals involved in the alleged frauds with the requisite particularity as required by Rule 9(b).

United States ex rel. Goldstein v. Fabricare Draperies, Inc., Nos. 03-1460 through 03-1465 at 6 (Jan. 6, 2004).

The U.S. District Court had "federal question" jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (2000). The Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291 (2000).

REASON FOR GRANTING THIS PETITION

The Court should grant this Petition, because the lower courts are undermining the will of Congress and the FCA, and they are doing so in derogation of this Court's clear instructions on modern pleading and the plain text of Rule 9(b). As a result, highly meritorious actions that seek the return of tens of millions of dollars

of ill-gotten gains to the U.S. Treasury are being dismissed, despite extremely detailed pleadings. As in this case, they are being dismissed before defendants *even have to deny* the detailed and serious allegations against them, much less before any actual testing of these allegations through discovery, summary judgment or trial.

"[T]he FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 781 (2000). The FCA's *qui tam* provisions supplement the Government's efforts to "uncover fraud and abuse by 'unleashing a posse of *ad hoc* deputies to uncover and prosecute frauds against the government.'" *Harrison*, 176 F.3d at 784 (4th Cir. 1999), citing *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992).

In 1986, Congress amended the FCA in order to "correct[] restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions" and "encourage more private enforcement suits." S. Rep. No. 99-345, at 4, 23-24 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269, 5288-89. In seeking to rectify the courts' overly "restrictive interpretations" of the pre-1986 version of the FCA, Congress (*inter alia*) defined the terms "knowing" and "knowledge" expansively; these key terms now explicitly encompass not only a defendant's "actual knowledge" of the falsity of its claim, but also a defendant's "deliberate ignorance" and "reckless disregard" of the truth or falsity of its claim. *See* FCA § 3729(b). To leave no doubt of its intentions, Congress went even further – explicitly stating in the amended FCA that "no proof of specific intent to defraud is required." *Id.*

As this case demonstrates, once again the lower courts are thwarting Congress' intent by misapplying basic pleading rules in a manner that eviscerates – if not judicially excises – the 1986 FCA amendments. Fed R. Civ. P. 8(a) requires only "a short and plain statement of the claim." "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 47-48; *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169 (1993). "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. 'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

In actions alleging fraud or mistake, Rule 8(a) must be read in conjunction with Rule 9(b), which states that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." This Court repeatedly has rejected interpretations of Rule 9(b) that expand its reach beyond "fraud or mistake." *See Swierkiewicz* (rejecting the application of Rule 9(b) to Title VII and ADEA claims); *Leatherman*, 507 U.S. at 164 (rejecting the application of Rule 9(b) to claims under 28 U.S.C. § 1983).

In FCA actions, the lower courts are side-stepping these controlling authorities. As noted above, Rule 9(b)

applies to "fraud." Under the FCA, "no proof of specific intent to defraud is required." FCA § 3729(b). Therefore, by the plain language of Rule 9(b) and the FCA, and this Court's decisions in *Swierkiewicz* and *Leatherman*, the lower courts' application of Rule 9(b) to actions under the FCA is erroneous. Instead of applying the plain text of Rule 9(b) and the FCA, the lower courts have returned to an unduly restrictive interpretation of the FCA as a traditional fraud statute, and misapplied Rule 9(b).

As this case illustrates, the lower courts' restrictive interpretation of the FCA is exacerbated by a highly idiosyncratic application of Rule 9(b) to FCA pleadings. Specifically, in the Fourth Circuit, Rule 9(b) requires the pleading of "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison*, 176 F.3d at 784. As the examples set forth above demonstrate, the Amended Complaints explicitly alleged each of these Rule 9(b) facts. They allege: (1) the dates (*e.g.*, "December 11, 1994"; "December 14, 1994"); (2) the places (*e.g.*, "1243 N. Gene Autry Trail, Palm Spring, California 92262-5414"); (3) the identities (*e.g.*, "Craig Schwartz," "June Graber," "Joel Breslau," "Elliot Breslau"); (4) the content of the misrepresentations (as well as the verifiable facts) (*e.g.*, In its 1989 proposal under Solicitation No. FCNH-89-D508-B-11-28-89, "Contract Décor represented itself to the GSA to be the manufacturer of Special Item Numbers 493-1 (Draperies and Drapery Accessories) and 493-2 (Coordinating Bedspreads)," *etc.*); and (5) the benefit obtained (*e.g.*, Mill End obtained MAS contract nos. GS-00f-3353A, GS00F-33354A and GS-03F-5116C). Yet in its opinion affirming the dismissal of the Amended Complaints under Rule 9(b), the Fourth Circuit declined to address *even a single one* of these allegations. Its opinion exemplifies the impermissibly restrictive

approach taken by the lower courts to FCA pleading, and the unpredictable and idiosyncratic manner in which the courts apply this restrictive interpretation in assessing the sufficiency of FCA pleadings. This illustrates the need for corrective action by this Court.

In this case and generally, the lower courts have turned FCA pleading into "a game of skill in which one misstep by counsel may be decisive to the outcome." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). Yet the reality is even worse, because this FCA pleading "game" is one in which, at least in application, the rules are simultaneously unknown and shifting; in which pleading standards are applied in an elusive and idiosyncratic manner that is plainly irreconcilable with the FCA, this Court's precedent on pleading, the plain text of Rule 9(b), and ultimately "the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.*

CONCLUSION

For the foregoing reasons, the Petitioner respectfully asks that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN,

Plaintiff-Appellant,

v. No. 03-1460

FABRICARE DRAPERIES, INCORPORATED; MICHAEL'S TEXTILE COMPANY,

Defendants-Appellees.

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN,

Plaintiff-Appellant,

v. No. 03-1461

SKYLINE MILLS,

Defendants-Appellee.

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN,

Plaintiff-Appellant,

v.

No. 03-1462

PANATEX FABRICS, INCORPORATED,

Defendants-Appellee.

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN,

Plaintiff-Appellant,

v.

No. 03-1463

LEONARD'S DRAPERIES, INCORPORATED; CONTRACT DECOR, INCORPORATED; EMPIRE DRAPERY COMPANY; VICTOR ROME, INCORPORATED; ADMINTERNATIONAL, INCORPORATED,

Defendants-Appellees.

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN,

Plaintiff-Appellant,

v. No. 03-1464

MILL END SHOPS, INCORPORATED,

Defendants-Appellee.

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN,

Plaintiff-Appellant,

v. No. 03-1465

OHN CARROW, LTD., t/a Cresthill Draperies,

Defendants-Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge.(CA-01-1154-JFM, CA-01-1155-JFM, CA-01-1156-JFM,CA-00-3459-JFM, CA-00-239-JFM, CA-00-240-JFM)

Argued: December 4, 2003
Decided: January 6, 2004

Before WILKINSON and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Alan Mark Grayson, GRAYSON, KUBLI & HOFFMAN, P.C., McLean, Virginia, for Appellant. Douglas Warren Baruch, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, Washington, D.C., for Appellees. ON BRIEF: Victor A. Kubli, GRAYSON, KUBLI & HOFFMAN, P.C., McLean, Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This qui tam action concerns claims brought by the plaintiff, Jeffrey Goldstein (Goldstein), under the False Claims Act (FCA), 31U.S.C. §§ 3729-3733, alleging that certain companies engaged in the business of supplying draperies, bedspreads, and/or related items to the United States government, defrauded the government. The district court dismissed Goldstein's amended complaints pursuant to Rule9(b) of the Federal Rules of Civil Procedure. Goldstein appeals, and we affirm.

I

For nearly three decades, Goldstein worked in every aspect of the manufacture and sale of draperies, bedspreads, blinds, and related hardware to federal

agencies and the general public. He owned and operated Commercial Drapery Contractors, Inc. Goldstein also played a prominent role in the federal drapery contractor industry, as he headed the Association of Federal Drapery Contractors.

In 2000 and 2001, Goldstein filed seven qui tam complaints against twelve defendants. Only six of the complaints and eleven of the defendants (Leonard's Draperies, Inc., ADM International, Inc., Con-tract Decor, Inc., Empire Drapery Company, Victor Rome, Inc., Mill End Shops, Inc., Fabricare Draperies, Inc., Michael's Textile Company, Skyline Mills, Panatex Fabrics, Inc. (Panatex), and Cresthill Draperies (Cresthill)) are involved in this appeal. Each complaint contained two counts. Count One alleged that each defendant presented false claims to the government for payment, id. § 3729(a)(1). Count Two alleged that each defendant fraudulently induced the government to make payments on claims, id. § 3729(a)(2).

As the FCA requires, Goldstein filed his complaints in camera and under seal, serving only the Attorney General and the United States Attorney for the District of Maryland. Id. § 3730(b)(2). The government declined to intervene, but it permitted Goldstein to proceed against the defendants. Id. §§ 3730(b)(1), 3730(c)(3). The district court ordered the complaints unsealed and served.

The defendants named in four of the seven complaints moved to dismiss the complaints for failure to plead fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. On October 8, 2002, the district court dismissed the four complaints as insufficient under Rule 9(b), but granted leave to amend.

Panatex, Cresthill, and another defendant not involved in this appeal did not move to dismiss the

complaints filed against them.Cresthill filed an answer. After it filed its answer, Cresthill filed a motion for judgment on the pleadings under Rule 12(c). On February 11, 2003, the district court granted Cresthill's Rule 12(c) motion for judgment on the pleadings. In the order, the district court granted Goldstein leave to amend his complaint against Cresthill.

Due to a delay in the service of the complaint against Panatex, the date Panatex was required to file a responsive pleading occurred after the district court entered its October 8, 2002 orders dismissing four of the seven complaints. As a result, Panatex and Goldstein agreed to a stipulated schedule for an amended complaint to be filed in the Panatex case.

Between November 27, 2002 and February 26, 2003, Goldstein filed his amended complaints. The gist of Goldstein's amended com-plaints is that the defendants lied to the General Services Administration (GSA) in order to obtain a series of lucrative GSA Multiple Award Schedule (MAS) contracts and then lied to keep them.* GSA, through the Federal Supply Service, solicits, negotiates, awards, and administers MAS contracts to supply commonly-used products and services to all federal agencies. The MAS process allows

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*The record reflects that Goldstein was "indicted for, and pled guiltyto, some of the same practices described in the [amended complaints] inrelation to each of the Defendants." (J.A. 216).

the government to obtain, through a simplified process, commonly used supplies and services at prices associated with volume buying. GSA negotiates and approves a supplier's offer to sell specific items at set prices. Thereafter, procuring agencies are not required to conduct competitive bidding when making purchases. As a result, suppliers generally covet MAS contracts.

To be considered for an MAS contract, a supplier must certify to the government that it meets certain specific requirements. For example, a supplier must certify that it is a manufacturer or regular dealer of the solicited items, so as to avoid sales to the government by middlemen, who tend to boost prices and insulate the true supplier from liability. In its proposal, the supplier must also certify that its prices are based on established catalog or market prices of commercial items sold in substantial quantities to the general public. Moreover, a supplier must agree to disclose all discounts and rebates during the life of the MAS contract and must sell only approved items at approved prices.

Goldstein alleges that the defendants engaged in fraudulent conduct with regard to two GSA solicitations, one for the period of 1990 to1995, and the other for the period of 1995 to 1999. By these solicitations, GSA sought proposals from qualified suppliers of draperies, bedspreads, blinds, and related hardware and items. The vast majority of the FCA claims brought by Goldstein allege that the defendants were unqualified for any MAS contract, i.e., that the defendants fraudulently induced the government into awarding the MAS con-tracts to the defendants by making numerous false statements in their respective proposals. Goldstein alleges, inter alia, that the defendants were untruthful when they certified in their respective proposals that their prices were based on established catalog or market prices of commercial items sold in substantial

quantities to the general public. He also alleges that the defendants used falsified price lists in their respective proposals. Goldstein makes the further allegation that the defendants were often untruthful when they certified in their respective proposals that they were the manufacturer of the goods they were selling the government.

In response to Goldstein's amended complaints, the defendants involved in this appeal filed motions to dismiss pursuant to Rule 9(b).In March and April 2003, the district court dismissed the amended complaints without leave to amend, concluding that the amended complaints did not comply with Rule 9(b). Goldstein noted timely appeals and we consolidated the appeals for disposition.

II

On appeal, Goldstein contends that the district court erred when it dismissed the amended complaints as insufficient under Rule 9(b). He further contends that the district court was precluded from dismissing the amended complaint against Cresthill under Rule 9(b) because Cresthill filed an answer to the original complaint and engaged in some discovery.

Having reviewed the briefs, the record, the arguments of counsel, and the relevant law, we hold that the district court correctly concluded that Goldstein's amended complaints did not set forth the time, place, content, and individuals involved in the alleged frauds with the requisite particularity as required by Rule 9(b). Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784-94 (4th Cir. 1999).Moreover, we find no merit to Goldstein's contention that the district court was precluded from dismissing the amended complaint against Cresthill pursuant to Rule 9(b). Accordingly, we affirm.

AFFIRMED

Civil False Claims Act, 31 U.S.C. §§ 3729-32 (1994)

§ 3729. False claims

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a

false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed

discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the

proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States

to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under

this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and

reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS § 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any

action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) €laims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(2)

Supreme Court, U.S.
FILED

APR 2 2008

No. 07-1031

OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES *EX REL.* JEFFREY P. GOLDSTEIN

Petitioner(s)

v.

FABRICARE DRAPERIES, INC., *ET AL.*

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[DATE STAMP]

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v. Civil No. JFM-00-3459

LEONARD'S DRAPERIES, INC., ET AL.

******

ORDER

For the reasons stated in the accompanying memorandum, it is, this 8th day of October 2002

ORDERED

1. The motions to dismiss filed by defendants ADM International, Inc., and Contact Decor, Inc. are granted;

2. The complaint is dismissed in its entirety for failure to comply with Fed. R. Civ. P. 9(b); and

3. Plaintiff is granted 21 days in which to file an amended complaint.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

[DATE STAMP]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[DATE STAMP]

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v. Civil No. JFM-00-3459

LEONARD'S DRAPERIES, INC., ET AL.

******

[DATE STAMP]

MEMORANDUM

Plaintiff has instituted this action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. Two of the defendants, ADM International, Inc., and Contract Decor, Inc., have filed motions to dismiss on the ground that the complaint fails to satisfy the requirements of Fed. R. Civ. P. 9(b).[1] The motions will be granted. Further, since plaintiffs allegations are insufficient under Rule 9(b) as to the other defendants as well, I will order that the complaint be dismissed in its entirety but grant leave to plaintiff to file an amended complaint.

---

[1]Contract Decor also challenges the sufficiency of plaintiffs allegations concerning personal jurisdiction and venue as well as plaintiff's standing to pursue this action under §3730(d)(3) of the FCA. ADM likewise challenges plaintiffs venue allegations and his standing. Another defendant, Leonard's Draperies, Inc. has also filed a motion raising the standing issue. I need not decide these issues until and unless plaintiff files an amended complaint complying with Fed. R. Civ. P. 9(b).

Plaintiff is Jeffrey P. Goldstein, the former president and owner of Commercial Drapery Contractors. Inc. Goldstein and his company werc engaged in the sale and installation of draperies, curtains, vertical and Venetian blinds, bedspreads, and related hardware and accessories, to the United States government. Goldstein was indicted and convicted of defrauding the government in connection with the sales. He has initiated this action and several others, alleging that other companies in the industry engaged in the same type of conduct for which he was indicted and convicted.

Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiff contends that the complaint satisfies Rule 9(b) because it specifies:

> • numbers and dates of Government solicitations in issue;
>
> • numbers, dales, and or effective periods of. . . [the defendants'] contracts in issue;
>
> • the ... [defendants'] proposals in issue;
>
> • the particular forms and documents within each ... proposal that contain false information;
>
> • the specific information on the identified forms and pages that is false, and the reason why the specified information is false;
>
> • and the manner in which ... [defendants] then exploited ... [their] tainted contracts, i.e., ... [their] submission of false payment claims at inflated prices.

While on their face plaintiff's allegations may seem specific, the specificity is illusory. Plaintiff does provide particulars concerning how government contracts in the industry are bid and how the contracts are written. However, after reciting generic terms of the bid and contract documents, he simply makes a conclusory allegation that matters the defendants represented in those documents were false and fraudulent. As the basis for his knowledge of the alleged deception, plaintiff claims that "[b]y virtue of his positions and experience in the industry, . . . [plaintiff] has personal knowledge of ... [defendants'] operations." It may be that plaintiff does have personal knowledge or how participants in the relevant industry conduct their operations. That fact alone, however, does not provide any basis for inferring that the plaintiff knows or has reason to believe that a particular company has engaged in fraud.

In his opposition memorandum plaintiff cavalierly states that each defendant "need only open its file drawer, remove the specified ... proposals and contracts, turn to the specified pages therein, read the specified representations on these pages, and then prepare an Answer that admits or denies the allegations that these particular representations are false." That argument betrays a disregard for the purposes of Rule 9(b), which the Fourth Circuit has defined as follows:

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of ... Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally,

> Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc., 755 F. Supp. 1055. 1056-57 (S.D.Ga. 1990)).

Here, plaintiff's allegations might be sufficient, as plaintiff contends, to enable defendants to prepare an answer. However, to countenance the conclusory allegations plaintiff has made would not protect the defendants from a frivolous suit, prevent them from being subjected to a fraud action in which plaintiff learns all of his facts after discovery, or protect them from harm to their good will and reputation.

It may be that plaintiff does have knowledge of illegal activity in which the defendants engage because there was an industry-wide conspiracy of which he was a part. Plaintiff does not, however, so allege. Were he to do so, and specifically allege the reasons for his belief that a particular defendant was part of the conspiracy, he might be entitled to greater latitude in not identifying each and every specific misrepresentation he contends the defendant made.[2] However, in the absence of any such allegations, there is no basis for inferring from the allegations that have been made any "circumstances" of fraud at all, as required by Rule 9(b). Plaintiff cannot

---

[2]If plaintiff were to allege that he had knowledge of the defendants' fraud because he had entered into a conspiracy with them, that would also serve to place in proper focus the standing issue defendants have raised. The question would then be framed whether a person who has been found guilty of a substantive offense that also constituted an overt act of a broad conspiracy can bring suit under the FCA.

merely use his knowledge of the type of bid and contract documents used in the industry as a means to root through the defendants' files to determine if they contain evidence of fraudulent conduct.

For these reasons, plaintiffs complaint will be dismissed. Plaintiff is granted 21 days in which to file an amended complaint.

Date: October 8, 2002

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

[DATE STAMP]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*	
v.	*	Civil No. JFM-00-3459
LEONARD'S DRAPERIES, INC., ET AL.	*	

****

ORDER

For the reasons stated in the accompanying memorandum, it is this 25th day of March 2003

ORDERED

1. Defendants' motions to dismiss the amended complaint are granted; and

2. This action is dismissed without leave to amend.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*	
v.	*	Civil No. JFM-O1-240
JOHN CARROW, LTD t/a CRESTHILL DRAPERIES,	*	

****

ORDER

For the reasons stated in the opinion issued in the various companion cases (a copy of which is attached hereto), it is, this 10th day of April 2003

ORDERED

1. Defendant's motion to dismiss the amended complaint is granted; and

2. This action is dismissed.

/s/

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*
v.	* Civil No. JFM-00-3459
LEONARD'S DRAPERIES, INC., ET AL.	*
	****
UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*
v.	* Civil No. JFM-01-239
MILL END SHOPS, INC.	*
	****
UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*
v.	* Civil No. JFM-01-1154
FABRICARE DRAPERIES, INC., ET AL.	*
	****

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v.

SKYLINE MILLS

* Civil No. JFM-01-1155

****

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v.

PANATEX FABRICS, INC.

* Civil No. JFM-01-1156

****

MEMORANDUM

In an opinion issued on October 8, 2002, I dismissed the complaint in each of these actions, giving plaintiff leave to file an amended complaint to aver the fraud alleged with particularity, as required by *Fed. R. Civ. P.* 9(b). Plaintiff has now filed amended complaints, and defendants have moved to dismiss them on the ground that plaintiff still has not complied with Rule 9(b).[3]

---

[3]All defendants also seek dismissal on the ground that plaintiffs lacks standing to pursue these action under § 3730(d)(3) of the False Claims Act. Further, some defendants have moved to dismiss for lack of personal jurisdiction or improper venue. I need not decide the issues raised by these motions in light of my ruling that plaintiff has failed to comply with Rule 9(b).

In his amended complaints plaintiff asserts four different classes of misconduct in which each of the defendants is alleged to have engaged:

(1) submitting to the government various pieces of false information in order to obtain a "commerciality exemption" to the regulatory requirement that a GSA vendor submit cost or pricing data to the government contracting officer, including (a) false certificates of established catalog or market prices. (b) false "Discount Sales and Marketing Data." and (c) information that concealed discounts and prices that defendants received in connection with commercial sales;

(2) submitting to the government fabricated price lists, again for the purpose of obtaining the commercialility exemption;

(3) falseiy representing that they were entitled to "manufacturer status" in response to solicitations for bids;

(4) substituting products in violation of certifications they submitted to the government.

The basis for plaintiff's allegations that defendants engaged in these classes of misconduct is that he knows they must have done so in order to obtain the contracts they did. His knowledge on that point, in turn, is based upon his knowledge of the nature of the defendants' businesses and his knowledge of the governing regulatory scheme. Plaintiff makes no allegation based on personal knowledge that a particular defendant obtained a particular contract based upon a particular misrepresentation.

In effect, plaintiff is continuing to rely - as he did in his earlier complaints - upon his general knowledge of the industry and applicable government regulations as the sole basis for his allegations. He wants to obtain discovery to obtain particular information in support of those allegations. In my earlier opinion, I ruled that he could not do so. Because plaintiff has not cured the defect in his pleadings I will again dismiss the complaints, this time without leave to amend.[1]

Date: March 25, 2003

/s/
J. Frederick Motz
United States District Judge

[1] The particularly requirement of Rule 9(b) frequently gives rise to a concern that it may result in fraud going undetected because knowledge of the specific facts that would give rise to a fraud claim are exclusively in possession of the defendant. That concern is not present here because the government (which has declined to intervene in all of the actions) has complete knowledge of the representations that defendants made in their bids and other submissions and has had full opportunity to analyze them after having been put on notice of plaintiff's allegations of misconduct.